Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MALINKA WILSON,
by and through her next friend
and mother, Veronica Wilson,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The statute of limitations applicable to the Federal Tort Claims Act, 28 U.S.C. § 2401(b), requires that a claim be asserted within two years after its accrual. Malinka Wilson was born when her mother was still a child under state law. Less than two years after attaining her own majority but more than two years after giving birth, Malinka's mother filed suit claiming that a doctor covered by the FTCA and others had injured her baby through their negligence at the time of delivery. This case presents the following question:

Is the limitation period prescribed by § 2401(b) tolled (or does the cause of action not accrue) during the time that a child plaintiff lacks a legally competent representative capable of asserting and maintaining the claim on her behalf?

LIST OF PARTIES

Appellant:

Malinka Wilson, by and through her next friend and mother, Veronica Wilson

Respondent:

United States of America

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PETITION FOR A WRIT OF CERTIORARI

Malinka Wilson, by and through her next friend and mother, Veronica Wilson, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at *Wilson v. United States*, 403 F.3d 524 (8th Cir. 2005). *See* Appendix A (App. 1a-6a). The Eighth Circuit affirmed the order of the United States District Court for the Eastern District of Missouri, which is not reported. *See* Appendix B (App. 7a-23a).

STATEMENT OF JURISDICTION

The Eighth Circuit's opinion was rendered on April 6, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title 28 U.S.C. § 2401.

Time for commencing actions against United States.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Title 28 C.F.R. § 14.3.

Administrative claim; who may file.

(b) A claim for personal injury may be presented by the injured person, his duly authorized agent, or legal representative.

FED.R.CIV.P. 17

(b) Capacity to Sue or be Sued.

The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile.

MO. REV. STAT. § 507.115

Infant defined for civil suit purposes.

As used in sections 507.110 to 507.220, the term "infant" means any person who has not attained the age of eighteen years. All persons of the age of eighteen years or older, not otherwise disqualified, may commence, prosecute, or defend any action in his own name as the real party in interest.

STATEMENT OF THE CASE

On January 17, 2000, seventeen-year-old Veronica Wilson gave birth to her daughter, Malinka, at Forest Park Hospital in St. Louis, Missouri. Doctors transferred Malinka that day to Cardinal Glennon Children's Hospital. At the time, Veronica was aware that Malinka might have been injured due to negligence in her delivery.

Veronica celebrated her eighteenth birthday on October 3, 2000, some eight and one-half months after Malinka's birth. Under Missouri law she attained her majority and her capacity to sue on that date. MO. REV. STAT. § 507.115.

On January 25, 2002, Veronica mailed an administrative claim and filed a civil lawsuit in a Missouri court on behalf of Malinka. She sued several physicians, including Dr. Delores J. Gunn, M.D., and other health care providers to recover damages caused by medical malpractice. Veronica asserted that the defendants' negligence caused profound and irreversible brain damage to Malinka at the time of her birth.

The United States Attorney certified that Dr. Gunn was entitled to the protection of the Federal Tort Claims Act based on her association with a federally funded clinic. At the government's request, the case was removed to the United States District Court for the Eastern District of Missouri.

The government then sought dismissal or summary judgment. The government claimed that the action was barred by the two-year statute of limitations applicable to claims arising under the Federal Tort Claims Act (FTCA). Veronica argued that because she was a minor when

Malinka was born, the limitations period should be tolled until her eighteenth birthday.[1] If the statute were tolled in this manner, Malinka's claim would have been timely under § 2401(b).

The district court granted the government's motion for summary judgment in an order dated July 9, 2003. On October 15, 2003, the District Court entered an order remanding Malinka's claims against the remaining defendants to the state court. Veronica filed her notice of appeal on November 7, 2003. She asserted 28 U.S.C. § 1291 and 28 U.S.C. § 1346 as the bases for the court of appeals' jurisdiction.

The court of appeals affirmed the entry of summary judgment in an opinion handed down on April 6, 2005. *Wilson v. United States*, 403 F.3d 524 (8th Cir. 2005). While acknowledging that Veronica could not have commenced a civil suit on behalf of Malinka until she turned eighteen, the court affirmed the judgment, concluding that "[i]nfancy did not prevent [her] from making an administrative claim" within two years of Malinka's birth. *Id.* at 527.

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[1] The government presented no evidence that Malinka's teenaged, biological father ever saw Malinka, learned of her birth, or knew of the injuries attending her delivery. According to the district court, "[t]here is no evidence that [Malinka's biological father] knew the cause or existence of Malinka's injuries such that he could have asserted a claim on her behalf." *See* Appendix B at 18a.

REASON FOR ALLOWANCE OF THE WRIT

I. REVIEW IS WARRANTED TO DECIDE WHETHER AN INFANT'S CLAIM UNDER THE FEDERAL TORT CLAIMS ACT IS BARRED IF NOT FILED WITHIN TWO YEARS EVEN THOUGH THE INFANT HAD NO PARENT OR GUARDIAN LEGALLY COMPETENT TO ASSERT THE CLAIM WHEN THE TORT WAS COMMITTED.

The FTCA provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b) (2000). The court of appeals held in the present case that the negligently delivered child of a minor parent lost her right to sue the United States when her claim was not filed within two years after the injury even though it was asserted within two years after her mother first acquired the capacity to prosecute or settle an action under state law.

This Court should review that application of § 2401(b) because it diminishes the opportunity of an infant who has no adult competent and obliged to protect her legal interests to seek recovery from the government for its tortious conduct. The present opinion is hard to reconcile with the remedial purpose of the FTCA. And the opinion conflicts with other cases that have construed the Act's limitation provision with that remedial purpose plainly in mind.

While some statutes provide for tolling of the limitations period during an individual's disability, the FTCA contains no such exception. But neither this Court nor

other federal courts have taken the statute's silence as an invitation to give an inflexible construction to § 2401(b).

Under the FTCA, a tort claim generally accrues at the time of the plaintiff's injury. *United States v. Kubrick*, 444 U.S. 111, 120 (1979). When a victim of medical negligence is in "blameless ignorance"[2] of her injury, however, the cause of action does not accrue until she knows of the fact of injury and its cause. *Id.* at 120-22 & n.7.

The "blameless ignorance" principle has been extended to situations in which a plaintiff is unaware of her condition and has no one under a legal duty to assert the claim on her behalf. In such cases, courts have concluded that the claim does not accrue until the claimant dies, the impairment abates, or a guardian is appointed to represent the claimant's legal interests. *See, e.g., Clifford v. United States*, 738 F.2d 977 (8th Cir. 1984).

The plaintiff in *Clifford* had fallen into a permanent coma after overdosing on anti-depressant drugs that had been negligently prescribed by Veterans Administration doctors. 738 F.2d at 978. More than two years later his father was appointed as his guardian, and within two years after his appointment he filed an administrative claim on his son's behalf. The court of appeals rejected the government's argument that the plaintiff's family and

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[2] The "blameless ignorance" principle first appeared in *Urie v. Thompson*. 337 U.S. 163 (1949). In that case the Court, refusing to "charge Urie with the 'unknown and inherently unknowable'", held that his silicosis claim from his employment as a fireman on a steam locomotive did not accrue until the disease manifested itself. 337 U.S. at 169-70. The Court concluded that "the humane legislative plan" could not have intended the harsh consequence of preclusion "to attach to blameless ignorance." *Id.*